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JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 584 243

AMEDEE D. MORAN ET AL., Purchasing Trustees, Petitioners

vs.

CHARLES DILLINGHAM, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. .....

AMEDEE D. MORAN ET AL., Purchasing Trustees, Petitioners,

versus

CHARLES DILLINGHAM, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Justices of the Supreme Court of the United States:

The petitioners, Amedee D. Moran, Cornelius B. Gold and Henry K. McHarg, purchasing trustees, all citizens of the County and State of New York, file this, their applica-

tion for certiorari in the above entitled cause, and as grounds therefor would respectfully represent:

That on, to-wit, April 4th, 1885, on the application of Morgan's Louisiana & Texas Railroad & Steamship Company, the complainant in Equity Cause No. 21 of said Company vs. the Texas Central Railway Company, in the United States Circuit Court for the Northern District of Texas, at Waco, the Hon. Don A. Pardee, Circuit Judge, appointed Benj. G. Clarke and Charles Dillingham receivers of the railway properties belonging to the Texas Central Railway Company. (Order appointing receivers R. p. 3.) Said receivers having qualified, proceeded upon the performance of their duties, and on or about December 4th, 1886, Respondent Dillingham petitioned said Court to make him an allowance for his services, to be paid out of the current revenues coming into the hands of the receivers. Which petition having been presented to Hon. Don A. Pardee, the following order was entered:

"On considering the foregoing petition, it is ordered by the Court that the receivers be authorized and directed to place Charles Dillingham on the pay rolls of the receivers for the sum of one hundred and fifty dollars per month as an allowance upon his compensation as receiver in this cause. This allowance to date from the possession of the receivers and to continue while Mr. Dillingham gives his personal attention to the business of the company, or until the further order of the Court." (R. p. 7.)

The cause continuing on the docket of said Court, and having been subsequently consolidated with another cause known as the Farmers' Loan & Trust Co. vs. Texas Central Railway Company, No. 33, a final decree of foreclosure was

entered in said consolidated cause on April 12th, 1897, before the Hon. Don A. Pardee, Circuit Judge. (See Final Decree, R. pp. 8 to 23.)

The property having been offered for sale under the terms of said final decree was purchased by petitioners, as purchasing trustees, representing the first mortgage bondholders, and afterwards petitioners made application to said Circuit Court for possession of the property purchased by them, which petition having been presented to the Hon. Don A. Pardee, an order was entered thereon on August 28th, 1891, by said Circuit Judge. (See Petition and Order, R., pp. 24 to 30.)

A further petition was presented to said Court by these petitioners to modify the decree dated August 28th, 1891, which, having been presented to the Hon. Don A. Pardee, an order was entered thereon on November 4th, 1891, by said judge. (R., pp. 31 to 36.)

The property so purchased by these petitioners having been delivered to them under the terms of the final decree, and the respondent not having been formally discharged from his trust, filed his reports from time to time before the then master, Jno. G. Winter, and these petitioners, as purchasing trustees, appeared before said master and objected to the items of $150 per month, charged by the respondent as his compensation, after the sale and delivery of the property, from and after April, 1893. These exceptions were urged from time to time after said date as the reports came in, until said master filed his reports on the receiver's accounts, allowing to said respondent the sum of one hundred and fifty dollars per month, after such sale and delivery, so claimed by him under said order, as shown by said special master's reports (R. pp. 163 to 183). The reports having

been filed with the clerk of the court on April 8th, 1895, these petitioners filed exceptions thereto in court (R. pp. 37 and 38), which exceptions and the reports of the master were on the same day re-referred to Abner S. Lathrop, Esq., the standing master (R. p. 39). These petitioners filed amended exceptions to the receiver's account before Master Lathrop (R. pp. 39 to 43). After said reference, the master heard the parties and filed his report on September 26th, 1896, (R. pp. 192 to 196), and among other things he finds (R. p. 195):

"I consider from the testimony that the compromise made in September, 1891, allowing C. Dillingham, receiver, $20,000, was intended as revoking the order of December 4th, 1886, allowing him $150 per month, and was intended as full compensation for the services up to the time the receivership terminated. Since turning over the rolls, etc., to the purchasing trustees, the duties and labor of the receiver, as appears from the evidence, has not been arduous, and such services were contemplated when the fee of $20,000 was paid in. All the other parties to whom allowances were made so considered it, and they have made no further charge, except Special Master Winter, who was by special agreement allowed a further small compensation."

Master Lathrop recommends by the report that the objection to the reciver's reports, wherein he has retained the $150 per month from April, 1893, up to April 8th, 1895, be sustained, and that the said Dillingham be ordered to pay into the registry of the court the following amounts:

For 1893 nine months	$1,350.00
For 1894, twelve months	1,800.00
For 1895, three months	450.00
Total	$3,600.00

Upon the coming in of the report, the respondent filed exceptions thereto (R. pp. 196 to 199). The said exceptions and the master's report coming on to be heard before Hon. Chas. Swayne, one of the district judges, presiding, said report was in all things confirmed, and respondent was ordered to at once pay into the registry of the court the said sum of $3,600 (R. pp. 199 to 200). From which decree the respondent appealed to the Circuit Court of Appeals of the Fifth circuit, and the cause was submitted on oral arguments and printed briefs for both parties, and was heard by the Hon. Don. A. Pardee, presiding judge, and Hon. Wm. T. Newman, district judge. (See opinion, R. p. ——). After the cause had been submitted, and after petitioners' counsel had returned from New Orleans to his home in Waco, Texas, he prepared a motion to set aside the submission of the cause on the ground that Judge Pardee was recused, and sent said motion to the clerk, and at the same time wrote Judge Pardee a letter in reference to the motion, which letter motion and Judge Pardee's reply thereto are as follows:

"No. 556.
Chas. Dillingham
vs.
Amedee D. Moran, et al.

WACO, TEXAS, 5-5, '97.

"Hon. Don. A. Pardee, New Orleans, La.

"DEAR SIR:—When the above-entitled cause was taken on submission the other day by you and Judge Newman, I had not investigated the question of your disqualification, but since arriving home I have to some extent investigated the question in reference to the record, and I believe that you are disqualified under the statute. I would not like to have that question involved in the case, as it would cause

considerable delay and expense, and as the other cause, which is really a companion case to this one, which involves the right to the surplus fund in court, is set down for the 2d of June, I would prefer that you would set aside the submission in this case, and let it be submitted at the time the other cases come up in which you and Judge McCormick are recused.

"I would have made the suggestion at the time the case was submitted, but I had never investigated a question of this kind. I feel that it is my duty to advise you of my views on this subject before the case is decided. I have prepared a motion to set aside the submission, and sent the same to the clerk. I may be in error in regard to this, and have been at a loss to know how to reach the point, but have concluded that it is my duty, as stated above, to advise you of my views before a decision is reached.

"Yours truly,

"L. W. CAMPBELL."

No. 556.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

CHARLES DILLINGHAM, RECEIVER, APPELLANT,

versus

AMEDEE D. MORAN, ET AL., as Purchasing Trustees, etc., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TEXAS.

Now at this time come Amedee D. Moran, Cornelius B.

Gold and Henry K. McHarg, purchasing trustees, and move this Honorable Court to set aside the submission heretofore entered in the above entitled cause, and to set the same down for submission at a future day of this term for the following reasons, to-wit:

Because this case was taken on submission by Hon. Don A. Pardee, presiding judge of this court, and Hon. Wm. T. Newman, one of the district judges of this circuit, sitting with the presiding judge, constituting the court at which said submission was received, and appellees, after argument and submission, upon a re-examination of the record in the above entitled cause, and the Judiciary Act, and the decisions construing the same, are advised that the Hon. Don A. Pardee is recused and disqualified from sitting in this cause on the following grounds, to-wit: (1) While sitting at Circuit, as is shown by the record in this cause, he entered the order appointing the receiver, Charles Dillingham. (2) Fixed the compensation and allowance as receiver by the order of of December 4th, 1886. (3) Entered the final decree in this cause. (4) Entered the order of confirmation. (5.) Entered the order of August 28th, 1891, in this cause, and (6) entered the order of November 4th, 1891, in this cause. That said orders were entered upon petitions as shown by the record in this cause, and which of necessity required the judge in passing upon the petitions and entering the orders to decide the question of compensation of the receiver, Dillingham, and as to how long it should continue, and for what services it would cover, which was the same question, and in the same case, decided in the lower court, and which is brought to this Court for review, as is shown by the record in this cause. That counsel representing appellees neither at the time of argument, nor prior thereto had in-

vestigated the authorities with a view of determining this question, and was therefore not advised in the premises, and for this reason did not make the suggestion as to disqualification at the time.

Respectfully submitted,

L. W. CAMPBELL,

Solicitor for Moran, Gold and Henry K. McHarg, Appellees.

UNITED STATES CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT.
AT CHAMBERS.

DON A. PARDEE,
Judge.

NEW ORLEANS, La., May 7th, 1897.

L. W. Campbell, Esq., General Attorney Texas Central Railroad, Waco, Texas.

DEAR SIR—I have your letter of the 5th instant and note the contents. As a matter of strict law, both Judge McCormick and I are qualified to sit in the case of Dillingham vs. Moran, for neither of us participated in the rendition of the decree appealed from. Whether Judge McCormick is disqualified in the case of Morgan's Louisiana & Texas Railroad vs. Moran, continued over for a full bench, I cannot say; but I am reasonably clear that strictly I am not recusable in that case.

For some time and because it would not delay business,

both Judge McCormick and I have been in the habit of declining to sit in any cases of appeal wherein we have made former orders; when it comes, however, to embarrassing the business of the court by declining to participate, my impression is that we shall modify the habit.

Very respectfully yours,

DON A. PARDEE.

At the same time said letter was sent to Judge Pardee, the motion to set aside the submission was mailed to the clerk, by letter, as follows:

WACO, Texas, 5,-5, '97.

J. M. McKee, Esq., New Orleans, La.

DEAR SIR—I enclose you herewith motion in case No. 556, Dillingham vs. Moran, which was submitted before Judges Pardee and Newman. This motion is to set aside the submission on the ground that Judge Pardee is recused. I have written Judge Pardee on the subject of this motion. I wish you would file same and call Judge Pardee's attention to it. I do not wish to argue the motion. I will send Judge Clark's acceptance of service of the motion by succeeding mail so it will not be necessary for you to have him served. If such motions as these are required under the rules to be printed, I wish you would have it done for me and send me the bill. Yours truly,

L. W. CAMPBELL.

No response was ever received from the clerk as to what disposition was made of the motion. Judge Pardee, in his letter, having reached the conclusion that he was not recused, no further action was taken on the part of these petitioners,

and afterwards on, to-wit, the 23rd day of June, 1897, the opinion was delivered in said cause, reversing the decree appealed from, with instructions that the exceptions of these petitioners to the accounts of said Dillingham should be overruled. (R., p. ——). No motion for rehearing was filed or considered necessary in view of Judge Pardee's letter wherein he held that he was not recused in the case. Besides the opinion was delivered so late in the term, having been delivered only a few days before the Court of Appeals adjourned, nothing could be done by filing a motion for rehearing.

The writ ~~of error~~ is prayed for, first, upon the grounnd that Judge Pardee was recused, and second upon the ground tha the judgment of the Circuit Court of Appeals reversing the judgment of the lower court, is erroneous in that the decree appealed from should have been affirmed, and that that Court in reversing the Circuit Court has practically nullified the well established rule of this Court that a master's report of the facts will not be disturbed unless it clearly appears to be erroneous and without evidence to support it.

In support of our first ground, that Judge Pardee was recused and disqualified from sitting in this case on appeal, we cite the court to Sec. 3, of the Act to establish the Circuit Court of Appeals, approved March 3, 1891, and which reads as follows:

"That no justice or judge before whom a cause or question may have been tried in the District Court, or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit court of Appeals."

See American Construction Co. vs. Jacksonville, T. K. & W. Ry. Co., 13 Sup. Rep. at page 764, (s. c. 148 U. S.

Sup. Rep., p. 372); U. S. vs. Lancaster, 5 Wheat. 434; U. S. vs. Emholt, 105 U. S. 414.

Referring to the opinion and record in this case, it appears that the contention was as to whether the order of December 4th, 1886, wherein Judge Pardee placed the Receiver Dillingham on the pay rolls at $150 per month was still in force or had been abrogated and set aside by the compromise wherein Dillingham was paid $20,000, as reported by Master Lathrop, who held that such order was abrogated by such compromise, and which report was confirmed by the decree appealed from; or, if not abrogated, was the receiver entitled to said $150 per month under the terms of the original order made by Judge Pardee, *after he had ceased to attend to the business of the railway company?* Not only this, but the subsequent orders of the court quoted in the opinion, all made by Judge Pardee, are passed on, and it is held thereunder that the receiver was entitled to continue to draw the $150 per month until he was finally discharged by the court. Indeed, Judge Pardee rendered every order incorporated in the record, including the final decree, and which form the subject of the appeal, except the particular order appealed from. Reading these orders and the opinion of the court, enforces the conclusion that the same "cause or question" in reference to Dillingham's compensation, and as to how long it might continue, and under what circumstances, that was tried before Judge Pardee at Circuit, was re-tried before him on appeal. No amount of argument or elaboration could make this question plainer than will appear by a simple review of the record and the opinion. (See the various orders made by Judge Pardee at Circuit; R. pp. 3, 6, 8, 24 and 31.)

We state further, that when the case was submitted on

oral argument in the Circuit Court of Appeals and Judge McCormick's attention was called to the fact that he had entered the order of April, 8th, 1895, referring the exceptions of these petitioners to the accounts of Dillingham and Master Winter's report thereon to Master Lathrop, he recused himself and declined to sit in the case (R. p. 39).

Further, that when the case referred to in Judge Pardee's letter to L. W. Campbell, about which he says: "Whether Judge McCormick is disqualified in the case of Morgan's Louisiana & Texas Railroad & Steamship Company vs. Moran, continued over for a full bench, I cannot say; but I am reasonably clear that strictly I am not recusable in that case," was submitted on June 2d, 1897, Judge Pardee did in fact recuse himself in that case, and the case was submitted on briefs and oral argument before Mr. Justice White, as presiding judge, and Judges Maxey and Newman, district judges, composing the court. Judge McCormick's action, recusing himself, took place in the presence of the respondent's counsel, and the fact that Judge Pardee recused himself finally in the case referred to in his letter is known to Mr. Justice White, and these matters are here mentioned as showing that there must indeed be grave doubt as to Judge Pardee's authority, under the law, to sit in this case.

This application is based upon the further ground, as stated above, that the Circuit Court of Appeals erred in deciding the case, has invaded the province of the trial court and master in deciding questions of fact, has set aside the report of the master and the decree of the Circuit Court approving same on questions of fact only, and has ignored and set aside the well established rule of this Court that "the master's conclusions have every reasonable presumption in

their favor, and are not to be set aside or modified unless there clearly appears to have have been error or mistake on his part." The Court of Appeals by so doing reaches the conclusion that the report of Master Lathrop and the decree of the Court confirming it are erroneous and proceeds to set aside both, and to remand the case to the lower court with directions to overrule and discharge the motions attacking the receiver's accounts. The Court's conclusions are reached, and its order is based solely and exclusively on questions of fact. Not an equitable rule, or the enunciation of a single proposition of law can be found in the Court's opinion.

It appearing that upon a re-reference of the Receiver's accounts, and our exceptions thereto to Master Lathrop that he found the facts in favor of these petitioners, it remains to be determined whether, under the well recognized rules of this Court, the Circuit Court of Appeals were justified in substituting its judgment and estimation of the testimony for that of Master Lathrop, and of the Circuit Court confirming his report.

The rule above referred to, showing what weight is given to the report of a master on his findings of fact, is clearly stated in the case of Camden vs. Stuart, 144 U. S. 104, in this language: "His conclusions have every reasonable presumption in their favor, and are not to be set aside or modified unless there appears to have been error or mistake on his part."

Judge Pardee, in passing upon a master's report in the case of Missouri Pacific Railway Co. vs. Texas & Pacific Railway Co., 33 Fed. Rep., at page 806, says: "The law of the

case, as reported by the Master, is not questioned. The evidence is so conflicting that in order to reach a finding of the real facts some testimony must be rejected as untruthful. In such a case, *unless plain error is established, the finding of a master should be as conclusive as a verdict of a jury.*"

In 14 Am. & Eng. Ency. of Law, at page 940, it is said: "As a rule, however, it may be stated that *the findings of fact by the master are conclusive unless clear mistake or fraud is shown.*" The author cites in support of his statement of the law numerous decisions, some from this Court, and many from state courts of last resort. This proposition is so elementary, and appears to be so well settled in this Court that a further citation of authorities would, we think, be altogether unnecessary, but we quote below what the courts are holding on this question from a few cases, but we find none to the contrary:

"Findings of fact by a master in chancery, to whom, by consent of parties, a case is referred to find the facts, are conclusive in the absence of anything to show that they are unsupported by the evidence." Davis vs. Schwartz, 15 S. Ct. 237. 155 U. S. 631.

"Conclusions of fact of a master and trial court, on conflicting evidence in an equity case will not be disturbed on appeal, unless some obvious error is pointed out." Warren vs. Keep, 15 S. Ct. 83. 155 U. S. 265.

"The findings of a master on matters of facts are *prima facie* correct, and should not be overruled in an appellate court unless without evidence to sustain them." Gay Mfg. Co. vs. Camp, 65 Fed. Rep. 794.

"A referee's finding, like that of a jury, will not be disturbed if fairly warranted by the evidence." McClure vs. Times Pub. Co. (Pa. Sup.) 32 A. 293.

"A referee's findings of fact are not reviewable on appeal." McEwen vs. Louchiem (N. C.) 20 S. E. 519.

"A finding of a referee will not be disturbed, though the court might have reached a different conclusion, where it cannot be said with reasonable certainty that the finding was erroneous." D. G. Burton Co. vs. Cowan (Sup.) 30 N. Y. Sup. 317.

"The findings of a referee on conflicting evidence will not be disturbed on appeal." Douglas vs. Halstead, 30 N. Y. S. 592.

"The findings of a trial court will not be disturbed unless they are contrary to the clear preponderance of the evidence." Senour Mfg. Co. vs. Clarke (Wis.) 71 N. W. 883.

"Where a decree is based on conflicting evidence, the finding of a chancellor will not be disturbed." Chrislip vs. Teter (W. Va.) 71 N. W. 98.

"Where the appellate court cannot say that the findings of the trial court are clearly against the preponderance of the evidence, the judgment will be affirmed." Clausen vs. Hale (Wis.) 71 N. W. 122.

"Where a report of a referee was confirmed by the court, the judgment will not be reversed on questions of fact, unless clearly against the weight of the evidence." McCallan vs. Buckstaff (Wis.) 71 N. W. 604.

"A finding of fact on conflicting evidence will not be disturbed on appeal." Requa vs. Irwin (Sup.) 44 N. Y. S. 771.

"A finding of fact by a trial court will not be set aside unless against the clear preponderance of the evidence." Henderson vs. Adams (Utah) 48 p. 398.

"Conclusions of the referee on questions of fact, confirmed by the court, are in the nature of special findings, and, if supported by the evidence, will not be reviewed." Demsey vs. Schawacker (Mo. Sup.) 38 S. W. 954.

"The findings of an auditor or master, confirmed by the lower court, are to be taken as presumably correct, and will be reversed only in case of obvious error." Richardson vs. Van Auen, 5 App. D. C. 209.

"The Supreme Court cannot review conflicting evidence." Koons vs. Beach (Ind. Sup.) 45 N. E. 601.

"A finding by a circuit court on conflicting evidence as to the proper compensation of a trustee, not being flagrantly against testimony, will not be disturbed." Chenault vs. Madison County Court (Ky.) 38 S. W. 432.

"A master's finding of fact, on evidence sufficient to go to a jury, will not be disturbed on appeal." White vs. Wright, (Pa. Sup.) 36 A. 154.

"Findings of a court of equity, or by a referee, on conflicting evidence will not be disturbed, unless manifestly against the weight of evidence." Swyer vs. Salt Lake City Copper Mfg. Co. (Utah) 48 p. 311.

"A referee's findings of fact will not be disturbed unless

against the clear preponderance of the evidence." Hinz vs. Van Dusen (Wis.) 70 N. W. 657.

"Findings of a referee, especially when approved by the court below, having evidence to sustain them, will not be disturbed." Philadelphia Co. vs. United Gas Imp. Co., (Pa.) Sup. 36 A. 742.

"Where the master and the chancellor agreed with respect to disputed items in an account, and there is legal evidence to sustain them, they will not be reviewed." Still vs. Burkett (Tenn.) Ch. Ap. 39 S. W., 347.

"A finding by a master on conflicting evidence, approved by the Court, will not be disturbed unless clearly wrong." Hall Co. vs. Dresser (Mass.) 46 N. E., 420.

"The finding of a master that the rail of a railway track was so worn as to render its use negligence, made on conflicting testimony, and an examination of the rail by him in person, with counsel, will not be reviewed." Clyde vs. Richmond D. R. Co. (C. C.) 59 Fed. Rep., 394.

"Findings of fact by a referee on conflicting evidence, confirmed by the court, will not be disturbed on appeal." Hannaman vs. Karrick, 33 P. 1039.

"A referee's finding on conflicting evidence, involving the credibility of witnesses, stands on the same footing as a verdict." Briggs vs. Hiles (Wis.) 58 N. W., 752.

"Findings of a referee will not be disturbed on appeal unless against the manifest preponderance of evidence." Schute vs. Jones, 28 N. Y. S., 1072.

"A decree of a chancellor on conflicting evidence will not be set aside where there was any evidence to sustain it." Vaughan vs. Commercial National Bank, (Miss.) 18 So., 270.

"Findings of fact in equity will not be reversed unless they are against the weight of evidence." So. Com. & Savings Bank vs. Koeln, 60 Mo. App., 79.

"Where there is legitimate evidence fairly tending to establish a fact, the findings thereon by a special master will not be disturbed unless fraud or curruption is shown." Walston vs. Smith, 32 A., 486.

Bearing the above well settled rule in mind we turn to the findings of fact reported by Master Lathrop and upon which the decree of the Circuit Court is based, and to the testimony, so that this Court may determine whether there is evidence to support such findings.

The real foundation for the master's report (and the decree of the Circuit Court confirming it) that Dillingham should be required to return the money taken between April, 1893, and April, 1895, a period of two years, at $1,800 per year, or a total of $3,600, is the master's finding of fact as follows:

"I consider from the testimony, (1) that the compromise made in September, 1891, allowing C. Dillingham, receiver, $20,000, was intended as revoking the order of December 4th, 1886, allowing him $150 per month, and was intended as full compensation for the services up to the time the receivership terminated; (2) since turning over the rolls, etc., to the purchasing trustees the duties and labors of the receiver, as appears from the evidence, has not been ardu-

ous; (3) and such services were contemplated when the fee of $20,000 was paid in. All the other parties to whom allowances were made so considered it, as they made no further charge, except Special Master Winter, who was by special agreement allowed a further small compensation. I do not consider that I have a right to go behind the receiver's reports, which were reported on by the master and not objected to, as above stated. Therefore, the said receiver, by receiving $150 per month, from September, 1891, to April, 1893, has been much more than compensated for any labor he has performed as such receiver from September, 1891, up to the present time." (R. p. 195).

The first of the above findings by the master is: "That the compromise made in September, 1891, allowing C. Dillingham, receiver, $20,000, was intended as revoking the order of December 4th, 1886, allowing him $150, and was intended as full compensation for the services up to the time the receivership terminated." This finding is clearly supported by the testimony. Indeed, there is practically no evidence to the contrary, as will appear from the following summary of the evidence heard on this point by Master Lathrop:

The final decree of foreclosure provides:

"Second. Upon confirmation of the sale and delivery of title, the purchaser shall pay in cash such sums as may be ascertained, on due reference to and report by the master, sufficient to pay off and satisfy all the indebtedness of the receivers, incurred by them in this cause, including all the expenses and costs of the receivers' administration of the property, all claims and demands adjudged against them growing out of their operation of the property, all receivers'

certificates heretofore ordered to be issued and remaining unpaid, all indebtedness for pay-rolls, materials and supplies due by said receivers, *and also the compensation of the receivers, and their solicitors.*" (R. pp. 19 and 20).

Soon after the sale and confirmation, and pursuant to the above-quoted provisions of the decree of foreclosure, on June 8th, 1891, the receiver, Dillingham, and his attorneys and other parties having claims, filed their petitions for allowance with Master Winter. Some of these petitions are in the record. (R. pp. 117 to 120). We quote the receiver's petitition (italics ours):

"Petition of Receiver Dillingham for compensation. United States Circuit Court for the Northern district of Texas.

"MORGAN'S LOUISIANA & TEXAS RAILROAD & STEAMSHIP COMPANY, COMPLAINANT,

versus

TEXAS CENTRAL RAILWAY COMPANY, DEFENDANT.

NO. 21, EQUITY.

"Now before John G. Winter, special master in the above-entitled cause, comes Charles Dillingham, receiver in the

above-entitled cause, and prays that said special master will *make to him such an allowance for his services as receiver in the above entitled cause, from the date of his appointment until his discharge*, as to said master may seem just and proper, and appearer prays for all further and equitable relief.

"FARRAR & KRUTTSCHNITT,
"*Solicitors for Chas. Dillingham.*"

The claims presented by the petitions for allowance created a spirited controversy, which required the taking of considerale testimony and several hearings before the master, the time covering a period of several months, before the controversy thus engendered was finally determined. In the mean time, a large amount of correspondence took place betweeen the local attorney of the trustee, and the attorneys representing the purchasing trustees in New York, and a few telegrams passed between Master Winter and the New York counsel. At the several hearings before Master Winter, stenographic reports of the testimony were taken and filed with his report upon said petitions. These petitions and the correspondence between the attorneys in Texas and those in New York in reference to these claims were introduced in evidence before Master Lathrop. In addition thereto, we introduced in evidence the testimony of Henry K. McHarg, one of the purchasing trustees, and the receipt of Charles Dillingham, besides taking the oral testimony of a number of other witnesses, including Charles Dillingham, all of which appears in the record.

The report of Master Winter shows that it is made under the provisions of Article 18 of the final decree quoted above. The master states further: "At the hearing, claims for com-

pensation and allowonce were presented as follows." Then he sets out the claims of various parties, including the claim of Charles Dillingham, receiver, and on page 6 of the report he says:

"After several adjournments the report again came up for consideration in my office, in Houston, Texas, on the 24th day of August, 1891, when appeared the aforementioned counsel, Messrs. Baker, Kruttschnitt and Ballinger, whereupon counsel named stated in open Court that the claims for compensation by the receivers, Clark and Dillingham, and the Farmers' Loan & Trust Company, trustee, by Messrs. Baker, Botts & Baker, Farrar & Kruttschnitt, Turner, McClure & Rolston, Ballinger, Mott & Terry, Ballinger, Mott & Ballinger and Willie, Mott & Ballinger *had been adjusted with the purchasing committee hereinbefore mentioned.* I therefore make no report upon these items." (See Supplemental Transcript of Record, pages 1, 2 and 6.)

The foregoing finding shows that claims for allowance, including Dillingham's, had been compromised with these petitioners. We introduced in evidence before Special Master Lathrop Dillingham's receipt for $20,000.00, which reads as follows:

"CIRCUIT COURT OF THE UNITED STATES,

NORTHERN DISTRICT OF TEXAS.

Morgan's Louisiana & Texas Railroad & Steamship Company vs. Texas Central Railway Company et al.	Original Bill.

The Farmer's Loan & Trust Company } Cross Bill.
vs.
Texas Central Railway Company et al. }

Received of Messrs. Moran, Gould and McHarg, purchasing committee, the sum of twenty thousand dollars ($20,000.00) *in full of my fees and charges as receivers of the Texas Central Railway Company*, as per agreement. Dated Houston, Texas, Sept. 14th, 1891.

(Duplicate) CHARLES DILLINGHAM, Receiver."

(R. pp. 108 and 109.)

This receipt was offered in connection with the deposition of one of the petitioners, Henry K. McHarg, who testified among other things as follows:

"Second Interrogatory—This is a proceedings on behalf of the purchasing committee, who object to certain items of $150.00 each, charged in the accounts of Charles Dillingham, as receiver, covering a period from September, 1891, to April, 1895, aggregating between six and seven thousand dollars. The committee claiming that they paid Mr. Dillingham $20,000.00, on or about September 14th, 1891, in full of his services as receiver until his discharge. Now, you will please state if you remember the circumstances under which said $20,000.00 was paid, and how it was paid, and your understanding as to what such payment covered."

"Answer—I recollect the fact of our company having paid $20,000 in full for Mr. Dillingham's services, and supposed at the time that it covered them entirely."

"Third Interrogatory—You will please state if you had any attorney, or attorneys, looking after the claim of said Dillingham and others? If so, please state who acted as your attorney, or the attorney for the committee, and state who had control of such matters, you or your attorney, and who, if any one, negotiated said settlement. State all these matters as fully as you can."

"A—Messrs. Turner, McClure & Rolston were attorneys for the Trust company and for the committee. They had full control of all matters connected with the litigation, and negotiated the settlement."

"Fourth Interrogatory—State whether or not you had ever at any time, either prior or subsequent to the payment of said $20.000.00, had any agreement or understanding with Mr. Dillingham as to his right to receive any additional compensation over and above said $20,000.00? Please state fully."

"A—The committee or myself never had any agreement or understanding with Mr. Dillingham as to his right to receive any sum in compensation for his services in excess of the $20,000.00."

"Fifth Interrogatory—State whether or not you or the committee ever authorized or empowered any person to agree to give Mr. Dillingham any additional compensation for his services? Please state fully."

"Answer—Neither the committee nor myself ever authorized or empowered any person to agree to give Mr. Dillingham any additional compensation for his services."

"Sixth Interrogatory—Please state the names of the persons who constituted the purchasing committee to purchase the Texas Central Railway Company. State whether or not such persons are bondholders secured by the first mortgage on the Texas Central Railway Company, which mortgage was foreclosed?

"Answer—The purchasing committee to purchase the Texas Central Railway Company consisted of Messrs. Charles Moran, Cornelius B. Gould and myself. They either represented large holders of the first mortgage bonds or were themselves *bona fide* holders.

"Seventh Interrogatory—Please state what your understanding was, and from whom you derived your information, as to what the $20,000 was paid Mr. Dillingham for? That is, what services was he to perform? Please state this fully.

"Answer—My understanding was that the $20,000, which seemed to me an extravagant amount at the time, was paid Mr. Dillingham in full for his services. Could not state from whom I derived my information; presume it came from our attorneys." (R. pp. 90 to 92).

We also introduced in evidence the testimony of the former master, Jno. G. Winter, who among other things testified as follows:

"Question—Do you remember whether you made a report on these claims or not?

"Answer—The report in this case will show.

"Question—Look and see if that is your report. You made that report, did you not?

"Answer—Yes, sir. Report in master's No. 321, filed August 25th, 1891, was made by me and signed by me, and I recollect the circumstances.

"Question—Is that report on the compensation of the receivers and the attorneys?

"Answer—Yes, sir; the report speaks for itself. It appears to be as you say. It speaks for itself, however.

"Question—'After several adjournments, the report again came up for consideration in my office at Houston, Texas, on the 24th day of August, 1891, when appeared the aforementioned counsel, Messrs. Botts, Kruttschnitt and Ballinger, whereupon the counsel named stated in open court that the claims for compensation by the receivers, Clarke and Dillingham, and by the Farmers' Loan & Trust Company, trustee, by Messrs. Baker, Botts & Baker, Farrar & Kruttschnitt, Turner, McClure & Rolston, Ballinger, Mott & Terry, Mott, Terry & Ballinger, Willie, Mott & Ballinger, and Mott and Ballinger, had been adjusted with the purchasing committee hereinbefore mentioned. I therefore make no report upon these items.' Now I wish you to explain what was stated before you by counsel, what claims had been adjusted?

"Answer—I could not state what transpired there more fully than what you have just read. There was quite a gathering in my office at the time. This is all that was stated. When the reference was called, that statement was made by some one of the gentlemen, but I do not know who.

"Question—Do you know if the claims set fourth in the petitions upon which that report is made, the petitions filed by the parties respectively in master's No. 321, are the ones you have examined?

"Answer—I suppose so, the report will show." (R. p. 86 to 88.)

Mr. Dillingham testified in his own behalf before Master Lathrop as follows:

"Q—You received in September, 1891, from these same people that are objecting here $20,000.00, didn't you, as compensation as receiver?

'A—I received from the Farmer's Loan and Trust Company, I think.

"Q—No, it is the purchasing trustees?

"A—The question of compensation came up, and the compensation of the receivers and the lawyers and master came up, and it was referred to a special master, and before the hearing the Farmer's Loan and Trust Company, I suppose it was—it was through their attorneys—came in and made a proposition to us all to pay us a lump sum, which was accepted and mine was $20,000.00." (R. p. 54.)

On further examination respondent testified:

"Q—I will ask you to explain fully the matters and circumstances and details under which this sum of $20.000 00 was paid you by the Farmer's Loan and Trust Company for these parties here.

"A—The litigation was about to be closed and the mortgaged property had been sold, and the question of compensation to the receiver and the attorneys in the case come up, and the court ordered it referred to the master for report. The master had ordered a hearing or called for a hearing, but at that hearing the attorneys got together and it was suggested that it might be fixed out of court, and there was negotiations between Baker Botts & Baker on the one side, and .....

"Q—Baker, Botts & Baker represented whom?"

"A.—Themselves and me. And Mott & Ballinger, Ballinger, Mott & Terry, Mott & Terry, Mott's firm who had been engaged in the litigation, and Farrar, Jones & Kruttschnitt, and finally they arrived at a ..... the Farmers' Loan and Trust Company, to pay us all a lump sum.

"Q—Each?

"A—Each, and that proposition was accepted and they paid it.

"Q—What was that $20,000.00 intended as compensation for by the parties who paid it, and by you who accepted it?

"A—It was intended as compensation as receiver up to that time.

"Q—Up to that time?

"A—Yes, sir."

"Q—Was anything said at that time as to further pay for the receiver?

"A—No, sir.

"Q—What time was this $20,000.00 paid in 1891?

"A—I cannot tell, I understand Mr. Campbell has a report there that shows it.

"(By Mr. Campbell.) It shows September 24th, 1891.

"A—Yes, sir." (R. p. 58.)

He also testified further:

"Q—Was there any understanding or agreement or stipulation when the $20,000.00 was paid as to how it was to be treated—if it was to be in full for all services rendered and to be rendered in the future?

"A—No stipulation that it was for services to be rendered.

"Q—It did not cover services to be rendered?

"A—No sir.

"Q—Is it not a fact that the understanding was to the contrary—that you were to be compensated for matters with reference to the receivership thereafter, and that you were to continue to draw the $150.00 per month until the receivership was closed finally?

"A—I do not know that the question was discussed. I think at that time it was supposed the thing would be closed up at once." (R. pp. 58 to 62.)

The correspondence between Col. M. F. Mott, local counsel of the Farmer's Loan and Trust Company, and Messrs. Turner, McClure and Rolston, New York counsel, was attached to the depositions of Mr. McHarg, and among other things appear the following facts:

Special Master Winter having had the matter of compensation of the various parties under consideration, on July 22nd, 1891, had concluded a draft of his report, and wired to Messrs. Turner, McClure & Rolston, as follows:

July 22nd, 1891.

Dated Iredell, Texas.

To Turner, McClure & Rolston,
22 Williams Street, New York.

Draft report too late to send your copy. Draft comes up for consideration Houston, Texas, Saturday; Mott notified; wire me Houston if desired. Your claims allows Mott fifteen, Metropolitan two, Botts Farrar twenty-five hundred extra, Clark three, Dillingham thirty, all thousand.

JOHN G. WINTER. (R. p. 98.)

On July 25th, M. F. Mott, representing the Farmer's Loan and Trust Company in Texas, wrote to Turner, McClure & Rolston in substance as follows:

"After full conference with parties here, we find a settlement as matter of compromise can be made upon following terms, to-wit: Dillingham, receiver, $20,000.00 in addition to what he has received; Farrar & Kruttschnitt, including compensation as counsel for Mor-

gan's company five thousand in addition to what they have received; Baker, B. & B., ten thousand additional. All of Mott's firms seventy-five hundred. These offers of compromise are predicated upon immediate acceptance and payment; if not accepted, Dillingham, Clarke, and Farrar & K. will file exceptions that allowances to them are inadequate, and other parties will claim full amounts allowed by master. We advise acceptance of offer. Think they are the best you can get. See Clarke in person. Of course offers are made as a compromise and without prejudice. M. F. MOTT." (R. p. 98.)

On July 27th, M. F. Mott wrote to Messrs. Turner, McClure & Rolston again as follows:

"To McClure & Rolston,
22 Williams Street, New York.

"Winter writes me that he will change his report so as to allow Dillingham five thousand per annum, less amounts received; B., B. & B. three thousand per annum. This increases somewhat their allowances, but does not affect compromise offers. Wait for my letter of yesterday. M. F. MOTT." (R. p. 99.)

In a letter from M. F. Mott to H. B. Turner, of July 26th, 1891, in reference to what Dillingham claimed, he uses this language:

"First. As to Dillingham, he was disappointed in the amount of the award, and insisted that it should not be less than $30,000.00 in addition to the amounts already received. He was present with his attorney who had prepared objections to the draft of the report

on several grounds, and was ready to present and argue the same. The proposed report gave him in the neighborhood of twenty thousand dollars additional, with which he was not satisfied, and he claims ten or twelve thousand in addition to the allowance. I think that you and I know pretty well that he would get all he claims at the end of a litigation. It was with much difficulty he could be induced to make the offer. He seemed entirely confident and regards a ten thousand dollar abatement in his claim as a great concession. I think he was in serious earnest." (R. p. 102.)

On July 24th, 1891, Herbert B. Turner, of the firm of Turner, McClure & Rolston, wrote to Charles Moran, Esq., chairman of the purchasing trustees, a letter, in which he says:

"My correspondent telegraphs me that he has had a full conference with the parties at Houston, and was authorized to submit the following figures for a settlement as a matter of compromise: Dillingham, receiver, twenty thousand dollars. * * * These offers, he says, are predicated upon immediate acceptance and payment, and are the results of a long conference. It is necessary to know what will be done by the committee, because the parties in interest desire to file exceptions against the referee's report if an arrangement cannot be made; Dillingham, Clarke and Farrar & Kruttschnitt will file such exceptions on the ground that the allowance made to them is inadequate. The other parties, unless the settlement is made, will claim the full amounts allowed by the master, as above suggested. We suppose you know that this matter will be in the hands of Judge Pardee for settlement, unless an arrangement is made. Of

course it is desirable to make an arrangement, but you must yourself judge whether you are likely to fare better or worse by bringing the matter before the judge. Of course these matters must be arranged before possession can be obtained. Please get the opinion of the committee, and let us hear from you as soon as practicable.

"Very truly,

"HERBERT B. TURNER." (R. pp. 107 and 108).

Mr. Dillingham, in addition to his testimony, introduced in evidence a letter written to him on March 12th 1894, by Henry K. McHarg, one of the purchasing committee, in which letter, among other things, he says:

"I also notice that Mr. Winter has made a report up to December 31st, 1892, inclusive, of the balance on hand. I supposed that when the road was sold his compensation as special master ceased, and that in fact there was no one under pay except yourself, as receiver, until your discharge." (R. p. 111).

This letter is relied on as an admission by Mr. McHarg, one of the petitioners, that Dillingham was to receive his compensation until his final discharge, but Mr. McHarg, in his testimony, explained this letter to the entire satisfaction of Master Lathrop and of the Circuit Court. Referring thereto, he says:

"I did not write the letter with the idea he was entitled to the $150 per month, or to any additional sum over the $20,000, for I considered that amount an outrage upon our committee to pay at the time, but we seemed forced to do so and had to submit. In fact, my letter was sent to him simply to try and limit our payments in the future, not with

the idea or thought that he was entitled to anything, and as you will notice was written on March 12th, 1894, when the Texas Central Railway Company had assumed control of the property September 25th, 1891, or nearly two and a half years after we had been in possession." (R. pp. 92–93).

The foregoing is a fair statement of all the testimony, pro and con, introduced before Special Master Lathrop on the point as to whether the $20,000.00 was paid in compromise settlement of the claim set up in Dillingham's petition for "such an allowance for his services as receiver in the above entitled cause from the date of his appointment until his discharge." That there was a compromise the Circuit Court of Appeals distinctly finds in its opinion in the following language: "At the time of the sale of the railway property under a compromise arrangement, Receiver Dillingham was paid $20,000.00." That it was a compromise of the claim set up in his petitition for final compensation is a fact so patent on its face that we are unable to conceive how it could be determined otherwise, and that this petition *demanded compensation from the time of his appointment until his discharge*, it plainly speaks for itself. It cannot be said that Master Lathrop's finding that the compromise settlement was intended as full and final compensation until the receivership terminated is erroneous or without evidence to support it, but on the contrary it clearly appears that such finding is supported by the preponderance of the testimony. May an Appellate Court set aside a finding of fact by a master supported as this appears to be by the weight of the evidence? Would this Court set aside that report? Is there really a rule whereby we may be governed in judging what will be done with a master's report? We think such rule is firmly established in this Court and closely adhered to.

This Court will not disturb a master's report of facts unless it is clearly wrong.

The second of the above facts found by the Master is: "Since turning over the rolls, etc., to the purchasing trustees, the duties and labors of the receiver, as appears from the evidence, has not been arduous." And further that "by receiving $150.00 per month from September, 1891, to April, 1893, has been much more than compensated for any labor he has performed as such receiver, from September, 1891, up to the present time." These findings are clearly supported by the testimony, but they are not essential facts conducing to show whether or not the compromise agreement was entered into, but show clearly that Mr. Dillingham was not by the master and Circuit Court dealt with harshly and that he has no equity in his claim to the money and has been more than fully paid for all services. The testimony on this subject is likewise conflicting, but preponderates in favor of the master's findings. On this subject Judge Newman, in the opinion, says: "It is difficult to determine from the record exactly what services beyond perfecting land sales and preserving the fund the receiver rendered after the sale of the railway." The period from April, 1893, to April, 1895, is the time to which special attention should be directed. For the period from September, 1891, to April, 1893, is not involved in this contention, as Dillingham received the $150.00 per month during that time, and Master Lathrop reported against us for that amount because the reports of Master Winter approving the receiver's accounts for that period had not been excepted to in time. This money was taken and appropriated by Dillingham without the knowledge of the purchasing trustees, and therefore before they had begun to object to his accounts.

Dillingham received for his services during that period about $2,850.00. It is only the $3,600, covering the last two years that is in dispute here. Dillingham practically did nothing during this period except to hold in a bank, of which he was a large stockholder and vice president, about $40,000 of these funds. Mr. Gibbs, land commissioner, testified as follows:

"Mr. Dillingham has had nothing whatever to do with said lands and lots since the sale above mentioned, in so far as giving me instructions in any respect, or my making reports to him may be concerned; in fact, have had no instructions whatever from him since April, 1893." (R. p. 116).

This testimony shows that Mr. Dillingham had nothing whatever to do with the lands and lots after April, 1893. His accounts for the same period show that little or nothing was being done by him. Outside of receiving the money sent him by the attorneys, who, he says, collected the few land notes that were collected, he did nothing during this period except hold the funds in his bank and disburse to himself each quarter the sum of $450. (See his reports during this period; R. pp. 164, 171, 175-6, 177-8 to 185). Besides, during this period, he paid to one Kidd, out of the funds in hand, $600 to assist him in his arduous duties. (R. pp. 172-4).

Master Lathrop having heard all the evidence, concluded that the compromise agreement, as claimed by us, was established by the testimony; but he further found that Dillingham, by receiving the $150 per month from September, 1891, to April, 1893, had been much more than compen-

sated for all the services he had performed since the road was delivered to the purchasers down to the present time. In all seriousness, can it be said that these findings of fact are without evidence to support them? Did he commit an error in finding these facts? If so, where is the error, and where are the facts which condemn these findings? The master heard all the evidence; much of it was oral. Were not he and the Circuit Court much nearer the witnesses, and had they not better opportunities to judge of these facts than an appellate court could possibly have? And is not the recognition of this fact, the real basis of the rule that the master's findings are entitled to so much weight?

The third of the above facts found by the master is "and such services were contemplated when the fee of $20,000.00 was paid in." This finding is clearly supported by the testimony. This is a finding that such small services as Dillingham is shown to have actually performed were contemplated when the $20,000.00 was paid him. Our discussion of the first findings above makes this clear. It will be recalled that the compromise was of the claim set up in Dillingam's petition for allowance wherein he *demanded pay from the time of his appointment to his discharge.* He agreed to accept in satisfaction of this claim $20,000.00. These petitioners agreed to pay said sum in satisfaction of said claim. It was to get rid of that claim that this large sum of money was paid. Their minds met and the money was paid. Dillingham was not claiming in his petition compensation down to the time he filed his petition or down to the time of the hearing before the master, *but until his discharge.* It was that claim that was compromised and settled by paying $20,000.00.

Mr. Dillingham's counsel at the hearing asked him the

question: "Is it not a fact that the understanding was to the contrary, that you were to be compensated for matters with reference to the receivership thereafter, and that you were to continue to draw the $150.00 until the receivership closed finally," to which Mr. Dillingham answered: "I do not know that the question was discussed. I think at that time it was supposed the thing was to be closed up at once." (R. p. 61-2.) In other words Mr. Dillingham understood when he compromised the claim that the $20,000.00 was all he was to get, because it was supposed the thing was to be closed at once. And the evidence shows that to all intents it was closed at once so far as relieving him of any duties as receiver. And we are in perfect accord with Judge Newman when he says it is difficult to tell what Dillingham did after he turned over the road.

Mr. Dillingham, in his receipt to these petititioners, recites that it is "in full of my fees and charges as receiver of the Texas Central Railway Company as per agreement." (R. p. 108-9.) All the evidence shows that the agreement whereby he became possessed of the $20,000.00 was a compromise of his claim for compensation until his discharge. Mr. Dillingham's attention was called to the receipt, and he did not attempt to explain it. (R. p. 62-3.) Can it be said that the finding of Master Lathrop that the services, if any, actually performed by Mr. Dillingham were not contemplated when the $20,000.00 was paid him? If so, where are the facts in the record which condemn them? Mr. McHarg testified that he understood it covered all his services. The master took his statement, which is in perfect accord with Dillingham's petition and receipt. A finding to the contrary would have been clearly against the the weight of the evidence.

As the Circuit Court of Appeals, in writing its opinion, seems to have been under the misapprehension that we made no objections to the receiver's accounts until April, 1895, we desire to make that point clear. On this subject Master Lathrop finds:

"No objections were made to said reports and to the payment of said $150 per month, until said master took under consideration the reports allowing to said receiver $150 per month for the months of April and May, at which time L. W. Campbell, attorney for the Texas Central Railway Company. Charles Moran, Henry K. McHarg and Cornelius B. Gold, purchasing trustees, excepted to the allowance of said payment to Dillingham. That after that date the same parties objected to the reports filed containing the charge of $150 per month paid to said Dillingham, and on April 8th, 1895, they filed objections to all the payments of $150 per month to said Dillingham from September, 1891. None of said master's reports since September, 1891, have been approved by the court, *but I consider that the reports filed prior to April, 1893, were, by the rules of the court, approved*, no objections being made thereto." (R. pp. 194-195).

The master having found that we filed proper objections before Master Winter, and afterwards before the court, to all of the receiver's accounts since April, 1893, and no exceptions having been made to said findings in the lower court by respondent, and there being no assignments of error calling in question the correctness of these findings, it was not deemed necessary that a full report on that subject be brought up in the record.

The reports of Master Winter, covering the period from July 1st, 1893, to March 31st, 1895, which covers the entire period for which we recovered judgment against respondent, except the three months from April 1st to June 30th, 1893, are found in the record on pages 165 to 185, inclusive. The report for the quarter ending September 30th, 1893, was not filed until April 1st, 1895; (R. p. 171). The report for the quarter ending December 31st, 1893, was not filed until April 3d, 1895; (R. p. 176). The report for the quarter ending March 31st, 1894, was not filed until April 4th, 1895; (R. p. 178). The report for the six months covering April, May, June, July, August and September, 1894, was not filed until April 4th, 1895; (R. p. 181). And the report for the six months including October, November and December, 1894, January, February and March, 1895, was not filed until June 22nd, 1895; (R. p. 185). And the final account was not filed until May 16th, 1895; (R. p. 185).

All these reports show upon their face that petitioners objected to the item of $150 per month being charged by the receiver, and exceptions were filed to these reports, and to all items showing this charge, by these petitioners, on April 8th, 1895, which was long before some of the reports were filed, and in less than thirty days after any of them were filed. (R. pp. 37–38).

The only doubt remaining is as to whether exceptions were filed before Master Winter to the receiver's account for the quarter ending June 30th, 1893. Special Master Winter, in his report for the quarter ending June 30th, 1893, (R. p. 163) makes it appear that no objections were urged against the receiver's account for that quarter before him, but he uses this language in his report for the succeeding

quarter: "Mr. Campbell joined with me in an examination of the accounts aforesaid, and said that he had no objections or exceptions to make thereto, except to the two items of $150 each for salary paid to Receiver Dillingham for the months of April and May, 1893, etc." (R. p. 166). And Master Lathrop expressly finds from the record before him, and so reports to the court, that we excepted to all charges of $150 per month in the report for that quarter, and the findings not having been excepted to, and there being no objections raised to it by any assignment of error, we deem that it is unnecessary to further discuss that question.

Equity Rule 83 provides that, "Parties shall have one month from the time of filing the report to file exceptions thereto; and that if no exceptions are filed within that period by either party the report shall stand confirmed on the next rule day after the month is expired." It was upon this rule Master Lathrop found that as we had not filed exceptions to the reports of Master Winter on the receiver's accounts prior to April, 1893, we were concluded and estopped from going behind these reports, but the foregoing statement shows that the reports of Master Winter for the years 1893, 1894 and 1895 were nearly all filed just a few days before we filed our exceptions thereto, and that we excepted to all of those accounts before him. As an illustration: It is shown above that Master Winter's report on the receiver's accounts for the quarter ending September 30th, 1893, was not filed in court until April 1st, 1895, seven days before we filed our exceptions thereto in the court, (R. p. 171). And his report for the quarter ending December 31st, 1893, was not filed in court until April 3d, 1895, (R. p. 176), five days before we filed our exceptions thereto in

court, and his reports for 1894 and 1895, as shown above, were filed about the same time, or later.

This statement is made with the above particularity, so that in reviewing the opinion of the Circuit Court of Appeals it will not be necessary to verify this statement by the record every time we refer to this matter.

It having been shown above that the findings of Master Lathrop upon which the decree of the Circuit Court is based are clearly supported by the evidence, and that we in time excepted to all accounts since April 1. 1893 We invite this court to review with us the opinion of the Circuit Court of Appeals, so that it may judge whether any reason has been shown for setting aside said findings of fact.

That court finds that under a compromise arrangement Receiver Dillingham was paid $20,000 00. And further on in the opinion quotes Master Lathrop's finding of fact "that the compromise was intended as revoking the order of December 4th, 1886, allowing him $150.00 per month, and was intended as full compensation for the services up to the time the receivership terminated." That court also finds that the report was subsequently approved by the Circuit Court. Although this finding of fact in the record, and which of necessity went to the foundation of the case, still the opinion leaves it unchallenged. It is nowhere held that the finding is either not supported by the evidence or that the compromise agreement is illegal, invalid or contrary to public policy. Still the court reverses the decree appealed from and orders the exceptions to be dismissed. Allowing the master's findings to stand and

tacitly conceding their correctness, the court evades their force and effect by a general argument of confession and avoidance, and in support of this argument recites a large number of facts, nearly all of them taken from reports filed by the former Master Winter on the receiver's accounts for the years in question, and which reports were duly excepted to by us, never approved by any court, but were set aside and the accounts re-referred to Master Lathrop, and are supported by no evidence in the record, and which are of necessity, under the circumstances, binding upon nobody. What is not taken from the findings of Master Winter are extracts from orders entered by Judge Pardee subsequent to the compromise agreement providing that the court still holds possession of the property not sold.

The court in reciting the unconfirmed reports of former Master Winter lays stress on the letter written by Petitioner McHarg to Dillingham, of date March 24th, 1894. This letter was written long after we had begun to object to Dillingham's accounts. Besides Mr. McHarg fully explained this letter and testified that it was not written "with the idea he was entitled to the $150.00 per month, or to any additional sum over the $20,000.00." (R. p. 92.) Dillingham nowhere claimed that he relied on this letter as a reason for continuing to act as receiver. The master and Circuit Court passed on this evidence and found that it was fully and satisfactorily explained. No estoppel arising from this letter is pleaded.

These extracts from the reports of Master Winter,

and from the orders subsequently made, consume almost the entire opinion of the court.

The court having stated the case as above indicated, finds that "those who are mostly interested in the compensation of the receiver appear to have made no objection at all to his receiving the $150.00 per month at any time." It already appears very plainly that these petitioners, representing the first mortgage bond holders, and that these bond holders have a judgment against the Texas Central Railway Company amounting to over $4,000,000.00, $3,000,000.00 of which is unpaid and unsatisfied. (R. p. 8 to 22.) The decree appealed from in this case shows that the $3,600.00 required to be refunded by Dillingham is to be paid into court and to constitute a part of the funds of the receivership. (R. p. 199.) The record shows that the Morgan's Louisiana and Texas Railroad and Steamship Company has a judgment against the Texas Central Railway Company for about one-fifth or one-sixth of this amount. (R. pp. 8 to 23.) These are the only parties at interest, except the defunct corporation, the Texas Central Railway Company, which can have no interest whatever in this controversy; therefore, it cannot be said that those mostly interested stood by and made no objections at any time, for the purchasing trustees are the ones mostly interested of all parties.

The opinion proceeds: "Conceding the purchasing committee to have been interested in this question of compensation, they stood by for years and allowed the Receiver Dillingham to pay himself this amount, simply objecting during the last two years, and having their objections overruled without further action." This is

a misconception of the record. The testimony of Mr. McHarg, a member of the purchasing committee, shows that all the committee reside in New York; that they knew nothing of this matter until they discovered, about 1893, that Dillingham was taking out of the funds this $150.00 per month. They then begun to actively object thereto, and have kept up the fight until the present time. They have never abandoned their rights since they discovered they had any.

The court say further: "No effort seems to have been made to have the receiver discharged." Under the compromise agreement reported by Master Lathrop, the receiver should not have been discharged until the Circuit Court thought proper to do so, and the fact that the receivership was allowed to continue, is not only no evidence that Dillingham did not enter into the compromise agreement whereby he received the $20,000.00 in a lump, without delay or litigation in full of his fees and charges. and in lieu of the $150.00 per month, but is entirely consistent therewith.

The court say further: "No motion appears to have been made to have the court reduce the amount of his compensation. The orders fixing his compensation originally were allowed to stand." The amount of Mr. Dillingham's compensation was fixed by himself with those who, under the final decree, were required to pay it. The testimony shows that he contended for $30,000.00, and finally accepted $20,000.00 in addition to the amounts he had already received, and we do not understand that where an order, judgment or decree, in favor of any party, including a receiver, has been

compromised, that it is necessary to have a formal order entered by the court showing that it has been compromised in order to protect the rights of the parties. If this order be not made, but it be proven that the claim had been compromised, and the order in fact revoked in consideration of a large sum of money, no court would hold that the parties were estopped because a formal order of the court had not been entered showing this fact. It therefore cannot be said that the order fixing his compensation originally was allowed to stand. Under the master's finding it never had any substantial existence after the claim of Dillingham was compromised.

The court say further: "The orders passed at the time of the sale of the road, and the confirmation of sale, directing a continuance of the receivership, stood unchanged." The orders referred to by the court are those quoted in the former part of the court's opinion. One of these orders was entered about the time the compromise was entered into, and the other some time thereafter. The effect of these orders is simply to show that the court retained jurisdiction over the small amount of property, such as a few scattering town lots, and a few tracts of land, that was not foreclosed and sold out under the decree of foreclosure. We do not understand there was any reason why these orders should be revoked, or in the least interfered with in order to preserve the contract rights of these petitioners, and to hold Receiver Dillingham to his contract of compromise. But what effect these orders really have upon this case, especially during the last two years, is hard for us to understand. The testimony of Mr. C. C. Gibbs shows that every acre of land and every town lot held by virtue of the above-mentioned orders

was sold out under execution by the United States marshal on November 7th, 1893, and purchased by himself and Chas. Hamilton. He further testifies: "Mr. Dillingham has had nothing whatever to do with said lands and lots since the sale above mentioned, in so far as giving me instructions in any respect, or me making any reports to him, may be concerned; in fact, have had no instructions from him whatever since April, 1893." (R. p. 116). The above mentioned orders quoted by the Circuit Court of Appeals could certainly have no effect on these lands and lots, long since sold under execution. Mr. Dillingham seems to have had the remaining duty of holding in a bank, of which he was vice-president and a large stockholder, an average sum of about $40,000.00, and which was used by his bank in its business, and the additional duty of receiving from the attorneys, who collected what few land notes that were outstanding, the money so collected. With this state of facts in view, we hardly think that this court will hold it was necessary in order for us to preserve our rights to have the orders of August 28th and November 4th, 1891, revoked or abrogated, as the Circuit Court of Appeals seems to think.

The court proceed, and say: "And yet after the receiver had proceeded until 1895 with all the responsibilities, obligations, and duties of the recivership upon him, and after he had retained under the still existing orders of the court the amount allowed him by that order, a motion is made to require him to refund the money, and to pay it into the registry of the court." As shown above, we did not wait until the receiver had proceeded until 1895, as supposed by the court. We begun to fight him as soon as his report, beginning with April 1st, 1893, was filed with Master Winter, and this fight has been continued ever since. Where the

court gets its understanding that we begun the fight in 1895 is, we suppose, from the fact that we filed a general objection to all of his accounts when Master Winter finally filed them in court and his reports thereon, about April, 1895, but his and Master Lathrop's reports show that we had been objecting to all of them since April, 1893.

It has been clearly shown above that the receiver was not burdened with "the responsibilities, obligations and duties of the receivership" to any considerable extent. Master Lathrop finds, and the Circuit Court approved this finding, that all the responsibilities, obligations and duties performed by Mr. Dillingham after the road was turned over was much more than compensated for by his receiving the $150.00 per month from September, 1891, to April, 1893, amounting to about $2,850.00, and it cannot be true, if Master Lathrop's finding of fact is allowed to stand, that this money was retained under the still existing orders of the Court, for it has been shown above that the order of December 4th, 1886, was abrogated by mutual agreement by the only parties having any interest whatever therein.

The court say further that our motion was "accompanied with damaging but wholly groundless charges affecting the honor and honesty of Mr. Dillingham." We charged that he received $1,000.00 per year from his bank and that this was received in consideration of the $40,000.00 deposited by him in the bank. This, like other charges frequently made in the courts, was not proven, but it does not follow as the court seems to think, because we have assailed his honor and honesty that Mr. Dillingham should be excused from standing up to his contract of compromise, whereby he agreed to accept, and did receive, the $20,000.00 in compromise of his

claim for compensation from the date of his appointment until his discharge, and when he gave a receipt showing that it was "in full of my fees and charges as receiver of the Texas Central Railway Company." It may be conceded that we did him an injustice, but that is a different question from the one the court was called to decide, and the one we are now presenting. That question was finally decided against us by Master Lathrop, confirmed by the Circuit Court, and from which finding no appeal was prosecuted by any party, and the Circuit Court of Appeals does not make it appear as to what relevancy that branch of the case can have to the proposition under discussion.

The court say: "Why the receiver should have been permitted to go and receive this $1,800.00 per annum without any movement on the part of those interested to change the existing status is difficult to understand, except upon the theory that his services were valuable and necessary." The witness McHarg fully explained his reason for not excepting to these items until 1893, which was, because he did not know anything about it, and that he begun to make this fight as soon as he was apprised of the fact that Mr. Dillingham was claiming the $150.00 per month in addition to the $20,000.00, and the move was made just as soon as this information came to these petitioners. And it cannot be presumed in the face of this record that he was allowed to draw the $1800.00 per annum on the theory that his services were valuable and necessary, because the record shows that for the last two years he performed no services. There was no land or town lots on hand. They had been sold out, and he had the $40,000.00 in his possession, and the judge who wrote the opinion seemed perplexed to discover from the record what services Mr. Dillingham did

perform, even after the road was turned over, to say nothing of the last two years.

The Court say further: "When the purchasing committee excepted to the master's report, and their exceptions were overruled, they seem to have acquiesced all along until suddenly in 1895 this proceeding was instituted." The court seems to be under the impression that we only begun this fight in 1895, when we filed our exceptions in the court, but the reports of Master Winter and of Master Lathrop clearly show that we begun this fight when the report, beginning with April, 1893, was filed, and continued our objections thereto, having followed this up with a reiteration in the court. This matter was not suddenly sprung in 1895. The fight had been going on for two years prior to that date. The record clearly shows this.

The court further say: "The payment of the $20,000.00 as a compromise of the receiver's services was proved to have been based on the understanding that the receivership was then to be wound up and the receivership discharged, and did not in any way so far as we can see affect the order of the court making the monthly allowance to Dillingham." The finding of Master Lathrop to the effect that "the compromise was intended as revoking the order of December 4th, 1886, allowing him the $150.00 per month, and was intended as full compensation for the services up to the time the receivership terminated," is left unnoticed by the Circuit Court of Appeals. It is nowhere held that that finding is without evidence to support it, yet in the face of that finding the court says that the compromise was based upon the understanding that the receivership was to be then wound up and the receivership discharged, and did not in any way

so far as they could see affect the order of the court making the monthly allowance to Dillingham.

The court, in making the above statement, has evidently gotten its understanding of the evidence from the testimony of Mr. Dillingham, but Mr. Dillingham did not testify, nor did any other witness, that the payment of the $20,000.00 "was based upon the understanding that the receivership was then to be wound up and the receivership discharged." Mr. Dillingham, in reference to his continuing to draw the $150.00 per month, says: "I do not know that the question was discussed; at that time *I think it was supposed* that the thing was to be closed up at once." (R. p. 62.) Please note the language. At the time he was testifying, he seemed to think it was supposed the thing would be closed up at once—an exceedingly vague statement to be substituted in the place of the solemn finding of a master, supported by the confirming decree of the Circuit Court. Mr. Dillingham could not have supposed, and did not testify that the thing was to be closed up at once, for he says: "When the railroad was turned over to the trustees, there was left in my hands a large amount of lands, town lots, notes that had been given for town lots and lands that had been sold; the lands and town lots for sale, and the notes for collection, and I had general charge of the collection of these notes, and disposition of lands and lots and looking after the property left in the hands of the receceiver," and that he had about $40,000.00 in cash left on hand. (R. pp. 49 and 50.) As stated above, he nowhere uses the language that there was an understanding about these matters. And the further statement of the court that the payment of the $20,000.00 did not affect the drawing of the $150.00 per month, is shown by Mr. Dillingham's own testimony to have been not dis-

cussed. Indeed, it was altogether unnecessary to discuss that question, because Dillingham's petition for compensation, and that of all the other claimants which was being pressed at the same time, and Mr. Dillingham's receipt for the $20,000.00 showed very plainly what was claimed by him and what was being compromised.

Mr. McHarg testified contrary to the court's statement above (R. p. 105). Dillingham's petition (R. p. 109) and his written receipt (R. p. 108) testified to the contrary, and the correspondence between the attorneys introduced and read in evidence testified to the contrary (R. pp. 98 to 107). So it cannot be said that this money was paid upon that understanding, and without affecting the order of the court making him the monthly allowance, unless it be true that the solemn finding of a master, approved by the Circuit Court, based upon the preponderance of the testimony, are utterly worthless and must be set aside, and the mere thoughts and suppositions of an interested witness, contradicted by his own written statements, be accepted in their place.

But it may be granted that he and all parties mutually agreed in supposing that the thing was to be closed up at once. Can that fact have the effect of discharging Mr. Dillingham from his solemn engagement to accept the large sum of $20,000.00 in full of his fees and charges, without delay, expense or litigation, in lieu of the pittance of $150.00 per month?

If this supposition formed an essential inducement, and was one of the substantial conditions upon which the compromise agreement was entered into, and was broken without his fault, that fact, if true, might have been pleaded by

Mr. Dillingham as an equitable ground for asking relief from his contract. But he puts forth no such defense. He nowhere asks to be relieved from his contract. Unlike the Circuit Court of Appeals, he pleads no confession and avoidance. His sole defense is a general and vigorous denial of our facts.

The court further say: "And if it can be so construed, why was it not brought to the attention of the court at the time, certainly at the end of the first quarter after the sale when the receiver's accounts were filed?"

This has been fully explained by Mr. McHarg, who testified that he did not know that Mr. Dillingham was claiming or drawing this $150.00 per month, until he opened this fight. Estoppel is not pleaded. If it were pleaded and insisted upon, there is no element of estoppel in the facts of this case. Suppose it be conceded that the master's finding is correct, as the court says, and that the $20,000.00 was paid in compromise of Dillingham's entire services, and suppose it be conceded that we knew Dillingham was drawing this $150.00 per month, and raised no objections whatever thereto until April, 1893, is there any element of estoppel in that kind of a proceeding? Is Dillingham put in any worse position? Is he not put in a better position by the sum of $2,850.00 by our failing to object? Because, if the agreement was made as the master reported, he was clearly not entitled to the $2,850.00, and he got that solely because we did not object in time. The entire $3,600.00 was taken in the face of our objections, and while we were objecting.

The court proceed: "The finding of the special master is that up to April, 1893, the compensation should be allowed,

because the accounts having been filed, and there being no objections, they stood presumably approved by the court under the rule. If the approval of the court is presumed up to April, 1893, why is it not equally true that the approval of the court is presumed to the receiver's continued receipt of this amount?" The above statement and inquiry do the court an absolute injustice. It is based upon the idea that the Circuit Court was continually approving these accounts, and the judge writing the opinion doubtless did not have in mind the equity rule that all reports of a master in chancery stand approved if not excepted to within thirty days. That was the ground upon which Master Lathrop found against us on our exceptions to the money taken prior to April, 1893. Dillingham's reports were during that period regularly filed with Master Winter. He passed upon these reports and allowed the claim of $150.00 per month, and filed these reports in the Circuit Court, and as we did not except to these allowances within the thirty days allowed under the equity rule, they stood approved, not by any presumptive action of the court, but absolutely as a rule of the court. There is no logic in the suggestion that because they were approved by a rule of the court on account of our failure to except within thirty days that the approval of the court is presumed to the receiver's continued receipt of this amount, after we begun to object. This could not be presumed, because we excepted within the proper time, and have followed up these exceptions continually. Both of the master's reports and the entire record show this.

The court say further: "If the compensation was to run at all after the sale of the road, and the payment of the $20,000.00, there was no reason for stopping it in April, 1893. If it continued rightfully,

it continued by virtue of the original order allowing it in 1886, and it continued until the receiver was discharged, and so, instead of the approval of the court operating to justify the allowance up to April, 1893, and no longer, its effect would be to approve the allowance under the original order so long as Dillingham continued to act as receiver." Under the master's finding, it did not continue rightfully after the $20,000.00 was paid, and this money was taken wrongfully and in violation of Mr. Dillingham's contract of compromise with the committee until discovered in April, 1893, and it does not follow that it should continue until 1895 because we had slept on our rights under a rule of the court and had lost the $150.00 per month from September, 1891, to April, 1893, because we had failed to file exceptions to the reports of Master Winter allowing Dillingham's accounts within thirty days.

The court proceed: "It is difficult to determine from the record exactly what services, beyond perfecting land sales and preserving the fund, the receiver rendered after the sale of the railway." We agree with the court that it is difficult to discover from the record what services Mr. Dillingham did perform during this time. But whatever they were, Master Lathrop finds were more than paid for as shown above.

The court say further: "But it is certainly true that if the purchasing committee, or any one interested, had moved in the matter before the court, the monthly compensation Dillingham was receiving, if too large, would have been reduced to the proper amonnt, or he would have been discharged and some other arrange-

ment made for winding up the outstanding business." The compensation that Mr. Dillingham was entitled to receive had already been paid him, and there was no necessity of appealing to the court until we discovered that Mr. Dillingham was violating his contract. When this discovery was made we began to object in the proper manner, keeping up these objections, and finally filed our objections in the proper court, and secured an order holding Mr. Dillingham to his contract, and this is as much as any one would be called upon to do. Petitioners had every reason to suppose that Mr. Dillingham would stand up to his agreement. The fact that we did not object in time to save some of the money, is no reason why we should be deprived of the right when we discovered that he was violating his contract, and save as much as possible of the money that he was wrongfully taking.

It is very true that if any one interested had moved in the matter the Circuit Court would have reduced the compensation. That is precisely what was done. We objected just as soon as we got the information. The Circuit Court promptly acted and the result of its action was to not only find the existence of the compromise agreement, as claimed by us, but it found further that Dillingham had received much more than all his services were worth by taking the $2,850.00. This was in effect reducing his compensation to an average of about $67.90 per month, covering the entire period of forty-two months, from September, 1891, to April, 1895. And yet while the Circuit Court did this upon a full hearing of the evidence, the Court of Appeals reverses the decree when the opinion intimates that

that would have been the proper course to pursue. And when the Circuit Court pursued that course, the Appellate Court reversed its decree, and in doing so, ignored another settled rule of this court, "that the compensation to be allowed a receiver for his services, and those of his counsel, is largely discretionary with the court from which he derives his appointment, and its action will not be disturbed unless the discretion is abused." Stuart vs. Boulware, 133 U. S. 78. (s. c.) 10 Sup. Ct. Rep. 242.

It is nowhere claimed by the Circuit Court of Appeals, or by Dillingham or his counsel, that the allowance of $2,850.00 was inadequate, or that the Circuit Court abused its discretion in holding that he was more than compensated for any services that he performed after the road was turned over to these petitioners, by receiving said sum of $2,850.00.

The court say: "Nothing of this sort was done, however, and he was allowed to go on as receiver with all the responsibilities attached to that position." The master's findings show that he was to go on and perform such small duties as was required at his hands for the $20,000.00.

And the court say further: "And if entitled to compensation at all, after the sale of the railway, we see no reason why he is not entitled to it up to April, 1895." The only way the court can arrive at the conclusion that Dillingham was entitled to compensation up to April, 1895, is by ignoring the findings of Master Lathrop to the effect that "the compromise was intended as revoking the order of December 4th, 1886,

and was intended as full compensation for the services up to the time the receivership terminated." We concede that by substituting the thoughts and suppositions of Dillingham for all the other testimony in the record, and for the findings of Master Lathrop, and for the decree of the Circuit Court, this conclusion is logically reached that he is entitled to compensation up to April, 1895.

The court having disposed of the case in the manner above indicated, say: "We are of the opinion that the report of the special master, and the decree of the court below confirming the same, are erroneous. The decree of the Circuit Court is reversed and the cause is remanded with directions to overrule and discharge the motions attacking the receiver's accounts." It has been with the utmost difficulty that we have been able to find upon what ground the decision rests. It must rest, if at all, upon the proposition that Mr. Dillingham's thoughts and suppositions are entitled to greater consideration than the testimony of all the other witnesses, all the facts and circumstances adduced in evidence, the conclusions of Master Lathrop and the decree of the Circuit Court confirming his conclusions.

If this be true, the opinion is correct. If the decree of the Circuit Court, the report of the master and the overwhelming preponderance of testimony against Mr. Dillingham be given the credence that is ordinarily given by this court to the findings of a master, and a preponderance of the testimony supporting them, then the opinion of the Circuit Court of Appeals is logically erroneous, and should be quashed by this

court, and a decree entered here affirming the decree of the Circuit Court.

It appears from the above review of the opinion of the Circuit Court of Appeals that its decision rests upon the proposition that the acts, conduct and acquiescence of the interested parties in failing to move promptly, estop them from objecting to the claim of the receiver for the $150.00 per month taken after they begun to object. conceding that Master Lathrop's findings of fact establishing the compromise agreement are correct. We have already shown that this agreement is not only supported by the evidence, but that the Circuit Court of Appeals do not find to the contrary. Conceding the existence of the compromise agreement, is an Appellate Court justified, in the face of the record in this case, in attempting to avoid it, by arguing the facts in the records, which to its mind may tend to show acquiesence and estoppel? We answer. No. Why? Because, first, respondent did not plead estoppel and acquiescence in answer to our objections; second, the master's attention was not called to any such defense; third, the master did not find any facts bearing on that kind of defense: fourth, respondent did not except to the master's report on any such ground; and fifth, the assignment of error present no question of acquiescence or estoppel. The respondent has never set up in this case a plea confessing the contract of compromise and attempting to avoid its force and effect by relying upon estoppel and acquiescence. His sole defense has been a vigorous denial only.

Test the above statement in the order made:

First. Estoppel is no defense unless specially pleaded and relied on.

Ulman vs. Ieager, 67 Fed. Rep. 980.

Mabury vs. Louisville, &c., Co., 60 Fed. 645.

Warren vs. Providence Tool Co., 33 Atl. Rep. 876.

Bannister vs. Miller, (N. J. Ch.) 32 Atl. Rep. 1,066.

No such plea can be found in the record.

Second and Third. Facts relied on as a defense must be called to the attention of the master, or they are waived.

Topleff vs. Topleff, 145 U. S. at page 173.

Gay Mfg. Co. vs. Camp, 68 Fed. Rep. 67.

The master's attention was called to no such defense, and he made no report on estoppel and acquiescence.

Fourth. All objections to a master's report not taken by special exceptions thereto, are waived.

Sheffield, &c., Railway Co. vs. Gordon, 151 U. S. 285.

Respondent's exceptions to the master's report do not complain either that the proof showed that petitioners were estopped from insisting on the compromise agreement, or that the master erred in failing to find and report conclusions of fact on that point.

Fifth. A ground of objection to the decree appealed from, if not urged by assignment of error, is waived, and an appellate court have no right to consider such question.

Bogk vs. Gassert, 149 U. S. 738.

Grand Trunk Ry. vs. Ives, 144 U. S. 408.

Dufour vs. Long, 4 C. C. A. Rep. 663; (s. c.) 54 Fed. Rep. 913.

As often stated, respondent has no assignment of error which contends that the petitioners are estopped to rely on the compromise agreement on account of delay and acquiescence, or on any ground.

Let it be conceded, however, for a moment and for the sake of argument only, that there were no sufficient obstacles to the consideration of the facts in the record which the Circuit Court of Appeals, in effect, hold are sufficient to overcome the contract of compromise and make out a case of waiver, acquiescence or estoppel. Estoppel, if its existence is shown in this record, must be in the nature of estoppel *in pais*. This must arise by silence with knowledge, continued for such a length of time as to raise a conclusive presumption that petitioners had agreed to the taking of the money; or that respondent, by petitioners' silence and failure to object, has been placed in a worse condition, and for these reasons petitioners are estopped to object to his retaining the funds in question. The facts bearing on petitioners' delay and knowledge are, that petitioners all reside in the city of New York, some two thousand miles from Texas; that their counsel in the settlement of the compromise were Turner, McClure & Rolston, New York attorneys; that petitioners knew nothing of the fact that Dillingham was taking this money until about April to June, 1893; that the compromise was made and money paid to Dillingham in September, 1891, about one year and seven months before petitioners begun to except; that there is no proof that Master Winter extended notices of the filing of the receiver's accounts with him to the petitioners or their counsel, and his reports show that he did not; that neither Master Winter's reports nor the receiver's accounts filed with them show on their face that Dillingham was taking this

money; and no fact was proven to put them upon inquiry.

Young vs. Board of Com'rs, 51 Fed. 585.

The facts upon the question as to whether the one year and seven months delay put Dillingham in a worse condition than he would have been in had petitioners begun to object at once are, that during this one year and seven months Dillingham gave some attention to the land and land notes left on hand and held about $40,000.00 in his bank and continued monthly to pay himself out of this fund the sum of $150.00 and filed his reports quarterly with Master Winter, who gave no notice to these petitioners or their counsel, as his reports show, and who allowed these items quarter after quarter, filing his report thereon regularly in court, and which reports just as regularly stood confirmed after the lapse of one month under the rule of the court; that this went on for one year and seven months and until Mr. Dillingham had pocketed $2,850.00, and had secured it beyond our reach, because we failed to object within time under the rule; that Mr. Dillingham still has this money and the decree appealed from does not interfere with his right to keep it; that about the time he filed his report for the months of April, May and June, 1893, petitioners had gotten information of what Mr. Dillingham was doing; that they then learned that he was paying himself just as of old; that they then begun to object, and the contest has gone on since. During these contests of his various accounts before Master Winter as they were filed each quarter two years elapsed, Dillingham during this time continuing to pay himself this money over petitioners' objections. During this period he paid himself $3,600.00, and this is the money Master Lathrop reported ought to be refunded and which the Circuit

Court decreed should be. This statement shows that all the money ordered paid back was taken by Mr. Dillingham with full knowledge that we disputed his right to it and was taken over our objections, and during this period on November 7, 1893, all the lands and lots were sold under execution and Mr. Gibbs testified that Mr. Dillingham had had nothing to do with them since April, 1893. His chief business during this two years was to hold a large fund on deposit in his own bank.

And for all the services the receiver performed after the road was turned over he actually received the said sum of $2,850.00. The master found and the Circuit Court approved his finding that this $2,850.00 much more than paid Mr. Dillingham for all he has done since he delivered the road to these petitioners. Is there anything in these facts that tend to show that Mr. Dillingham is in a worse condition by our failure to object sooner? In all candor is he not actually $2,850.00 ahead and solely because we did not sooner object?

Authority is not necessary to show that no element of estoppel can be found in the above facts.

Petioners further show that the decision was rendered on June 23, 1897, and that the time, one year, allowed under the rules and decisions of this court in which to petition for a certiorari (The Conquerer, 166 U. S. 110) has not expired; that the mandate of said Circuit Court of Appeals has been issued, returned to and filed with the clerk of the Circuit Court.

It appearing that Judge Pardee was recused, and that the Circuit Court of Appeals have ignored the settled rule of

this court that a master's report of the facts will not be disturbed or modified unless it clearly appears to be erroneous and without evidence to support it, we feel warranted in petitioning this Honorable Court for a writ of certiorari.

Wherefore, petitioners pray that a writ of certiorari may issue to the said Honorable, the Circuit Court of Appeals for the Fifth Circuit, to bring up for review the judgment and decree of said court in the above numbered and entitled cause, and that an order do issue directing the Honorable Circuit Court of Appeals to recall its mandate, and hold the same subject to the orders of this court, and until the case may be disposed of in this Honorable Court; that upon a hearing of this cause that the judgment and decree of the Circuit Court of Appeals be quashed and reversed, and the decree of the Circuit Court sustaining the master's report be affirmed; and petitioners pray for such further and general relief in the premises as the case may require, and to this Honorable may seem meet and proper.

Respectfully submitted,

L. W. CAMPBELL,

Solicitor for Amedee D. Moran, Cornelius B. Gold and Henry K. McHarg, Petitioners.

STATE OF NEW YORK,
COUNTY AND CITY OF NEW YORK,

Personally appeared before me, the undersigned authority, Amedee D. Moran, Cornelius B. Gold and Henry K. McHarg, and each of whom being by me duly sworn deposes and says that they are the petitioners in the above applica-

tion for certiorari to the Supreme Court of the United States, and that they are acquainted with the contents of the foregoing petition, and that the facts, matters and things therein set forth are true to the best of their knowledge, information and belief.

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Sworn to and subscribed before me on this ..... day of February, 1898.

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Notary Public, New York County.